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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

HARICLIA C. BALLAS, C. P. BALLAS, VASIL BALLAS, AND HELEN QUICKENSTEDT,

Petitioners,

vs.

MARY CLADIS, PETER L. BANCROFT, NICHOLAS NICHOLSON, GUS CLADIS and UNITED STATES FLUORSPAR & MANGANESE, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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April 6, 1969

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NO. _____

IN THE
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OF THE UNITED STATES
OCTOBER TERM, 1968

HARICLIA C. BALLAS, C. P. BALLAS, VASIL BALLAS, and HELEN QUICKENSTEDT,

Petitioners,

vs.

MARY CLADIS, PETER L. BANCROFT, NICHOLAS NICHOLSON, GUS CLADIS and UNITED STATES FLUORSPAR & MANGANESE, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

I

INTRODUCTION

Petitioners Hariclia C. Ballas, C. P. Ballas, Vasil Ballas, and Helen Quickenstedt, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of

the State of Colorado in the case of Hariclia C. Ballas, C. P. Ballas, Vasil Ballas and Helen Quickenstedt vs. Mary Cladis, Peter L. Bancroft, Nicholas Nicholson, Gus Cladis and United States Fluorspar & Manganese, Inc., No. 23187.

II

REFERENCE TO OPINIONS BELOW

The unreported opinion of the Honorable Edward J. Byrne of the District Court of Denver County, Colorado, was entered on June 26, 1967, and it is attached hereto as Appendix "A". The unreported opinion of the Honorable Saul Pinchick of the District Court of the County of Denver, Colorado, was entered on September 30, 1965, and it is attached hereto as Appendix "B". The initial opinion of the Supreme Court of the State of Colorado was entered on November 19, 1968, and is attached hereto as Appendix "C". Thereafter, a Petition for Rehearing was filed and a subsequent opinion was entered on December 9, 1968, and is attached hereto as Appendix "D". Remittitur was issued forthwith.

III

GROUNDS ON WHICH JURISDICTION IS INVOLVED

1. The date and entry of the final judgment of the Supreme Court of the State of Colorado sought to be reviewed was entered on December 9, 1968.

2. Remittitur was issued on December 9, 1968.

3. The statutory provisions conferring jurisdiction on this Court to review the judgment of the Supreme Court of the State of Colorado by Writ of Certiorari is U.S.C. Title 28, Section 1257.

IV

QUESTIONS PRESENTED FOR REVIEW:

1. Can the State Court allow the president of a corporation to foreclose on an alleged deed of trust without notice or accounting to the stockholders.

2. Can the State Court allow the president of a corporation to foreclose on a mining property valued at in excess of Five Million Dollars ($5,000,000) without a showing that the corporation is indebted to the president.

3. Can the State Courts refuse to grant the stockholders an accounting and an opportunity to pay the president any amount the accounting shows is owed.

V

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14, Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any persons of life, liberty, or property, without due process of law, nor deny to any person

within its jurisdiction the equal protection of the laws.

Colorado Constitution, Article II, Section 25:

> "Due process of law -- No person shall be deprived of life, liberty or property, without due process of law.

VI

STATEMENT OF THE CASE

In October of 1950, the Federal Bankruptcy Court in Denver, Colorado, deeded to Mary Cladis the property involved in this case. Mary Cladis agreed to pay off all the debts of the corporation, put the mine in operation and protect the stockholders. Mary Cladis deeded the property to a new corporation, United States Fluorspar & Manganese, Inc., and allegedly had the officers of the corporation give her a note and deed of trust in November, 1950, for $70,366.94, a part of which sum she allegedly paid for a Judgment against the corporation which formerly owned the mining property, "The Chaffee County Fluorspar Corporation, in the amount of $50,000, and the balance of the $70,366.94 being interest allegedly due on said judgment.

In 1963, Mary Cladis foreclosed on the alleged note and deed of trust without notice to the stockholders or other officers of the corporation. Litigation ensued.

VII

GROUNDS AND REASONS FOR GRANTING WRIT OF CERTIORARI

A. The Colorado courts have refused to determine the rights of the stockholders.

B. The Colorado courts have deprived the stockholders of this mining corporation of property valued at in excess of Five Million Dollars without attempting to determine:

1. The rights of the president of a corporation to foreclose and take all of the assets of a corporation without an accounting to the stockholders; without a showing as to the consideration the president paid for the alleged note and deed of trust, and without notice to the stockholders as to the president's interest to foreclose.

Can a person breach an agreement with the federal Bankruptcy Court and take all of the assets of the corporation.

VIII

CONCLUSION

The stockholders of Chaffee County Fluorspar, Inc. have been deprived of their property without due process of law in violation of Amendment 14, Section 1 of the Constitution of the United States and Article II, Section 25 of the Constitution of Colorado.

Dated, Denver, Colorado, April 6, 1969.

Respectfully submitted,

HERBERT M. BOYLE
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Attorney for Petitioners

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APPENDIX "A"

IN THE DISTRICT COURT IN AND FOR THE
CITY AND COUNTY OF DENVER AND
STATE OF COLORADO
Civil Action No. B-87446

HARICLIA C. BALLAS, C. P. BALLAS, VASIL BALLAS, and HELEN QUICKENSTEDT, Plaintiffs,	)
v.	) JUDGMENT
MARY CLADIS, PETER L. BANCROFT, NICHOLAS NICHOLSON, GUS CLADIS, and UNITED STATES FLUORSPAR & MANGANESE, INC. Defendants.	)

THIS MATTER coming on for trial this 26th day of June, 1967, and plaintiffs appearing in person and by their attorney, Herbert M. Boyle and defendants Peter L. Bancroft, Nicholas Nicholson appearing in person and by their attorney, Robert Lee Kessler, and United States Fluorspar & Manganese, Inc. appearing in the persons of its Vice President and Secretary, Nicholas Nicholson and Peter L. Bancroft and by its attorney, Robert Lee Kessler, and defendants Mary Cladis and Gus Cladis appearing in person and by their attorneys, Walter F. Scherer and Clarke W. Karr, and, upon the motion of defendants Cladis to hear and consider their First Defense going to the capacity of plaintiffs to maintain the action as a stockholders' derivitive suit and their Fourth Defense of

res judicata and their denials contained in paragraph 16 of their Seventh Defense, going to the averments of the complaint that it would be futile for plaintiffs to demand of United States Fluorspar & Manganese, Inc. that such corporation bring this action preliminary to full trial of the merits and the Court having heard the evidence and statements of counsel regarding the Fourth Defense and said Defendants having offered in evidence the Judgment Rolls and a certified transcript of the testimony adduced on the trial in the Court before Hon. Saul Pinchick of the consolidated Civil Actions numbered B-63012 and B-65288 and being fully advised in the premises,

FINDS:

1. That there is no reason for delay;

2. That each and every claim of defendant United States Fluorspar & Manganese, Inc. in whose right this action is brought by plaintiffs as stockholders (if they are stockholders of such corporation) against defendants Mary Cladis and Gus Cladis has been fully and finally adjudicated by the judgment of this Court in the said Civil Action No. B-63012, entitled United States Fluorspar & Manganese, Inc., Plaintiff v. Mary Cladis, Gus Cladis and John W. Hughes, as Public Trustee in and for the County of Chaffee and State of Colorado, Defendants, and said Civil Action No. B-65288, entitled Marion T. Quinn, Leona Scott, Taki Thodos, Michael O'Leary and all others similarly situated, Plaintiffs v. Mary Cladis, Peter L. Bancroft, Nicholas Nicholson, John W. Hughes (as Public Trustee in and for the County of Chaffee and State of Colorado), and United States Fluorspar & Manganese, Inc., Defendants;

3. Although defendants Bancroft and Nicholson have been named as defendants herein, the complaint prays no relief as against them;

4. The claims of United States Fluorspar & Manganese, Inc. against defendants Cladis set out in its cross-claim have been likewise adjudicated in that the said cross-claim merely prays that the relief demanded by plaintiffs in their complaint be granted;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the complaint and the cross-claim of Defendant United States Fluorspar & Manganese, Inc., against Defendants Cladis be and the same are hereby dismissed, with prejudice and with costs to defendants Cladis, and

IT IS FURTHER ORDERED, on the oral motion of defendants Cladis to withdrawn their cross-claims against defendants Bancroft, Nicholson and United States Fluorspar & Manganese, Inc. without prejudice, that such cross-claims are continued for trial when and if a new trial may be had hereon on the merits or to be available in any other action which may be brought against defendants Cladis by plaintiffs herein or by or in the right of the other defendants herein.

Done in Open Court the day and year first above written.

BY THE COURT:

_____
JUDGE

APPROVED AS TO FORM.

_____ _____
Attorney for Defendants Nicholas Nicholson, Peter L. Bancroft and United States Fluorspar & Manganese, Inc. Attorney for Plaintiffs

_____
Attorney for Defendants Cladis

APPENDIX "B"

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

UNITED STATES FLUORSPAR AND MANGANESE, INC., A Colorado Corporation, Plaintiff,	)	
vs.	)	Civil Action
MARY CLADIS, et al., Defendants.	)	No. B-36012

CONSOLIDATED WITH

MARION T. QUINN, et al., Plaintiffs,	)	
vs.	)	Civil Action
MARY CLADIS, et al., Defendants.	)	No. B-65288

I am going to work this backwards with reference to the Claims. Now, since the Third, Fourth and Sixth Claims have been withdrawn by the plaintiff, there remains the First, Second and Fifth.

Now, as to the Fifth Claim for relief, it was alleged that the defendant Mary Cladis was to have received 125,000 shares of stock in exchange for the advances which she had made, and that therefore the conveyance to her, and the subsequent deed of trust which was given to her after she conveyed the property to the plaintiff corporation was invalid.

Now, all of the testimony, all of the minutes show that the deed of trust was authorized, shows

that the parties, the stockholders all treated the deed of trust as though it were a valid deed of trust. This was mentioned in the minutes and the affidavits and some contracts with the Crossroads Oil Company and contracts with Annesley, and his alter ego, or employer, the Seymour Company, so it seems to me that as far as the Fifth Claim is concerned, definitely there has been no prima facie case established by the plaintiff to substantiate the claims set forth therein. Therefore, the motion to dismiss the Fifth Claim for relief is granted.

Now, as to the Second Claim for relief, there have been accusations that the defendants Mary Cladis and Gus Cladis have both taken money from the plaintiff corporation and converted these funds to their own use. Now, as far as Gus Cladis is concerned, there hasn't been one iota of evidence to prove this with reference to the bank account which was controlled by Annesley and Seymour and their employee Mr. Nash. There has been no testimony whatsoever to show that any of those funds were converted either by Gus Cladis or Mary Cladis. There have been many accusations made by the plaintiffs, but I think one thing we do have to keep in mind here is that this was about as peculiarly run a corporation as any I have heard of. One, the officer of the corporation, Mr. Peter Bancroft, received a great number of checks. Now, I haven't added them up, but they amount to a substantial amount of money. He states that he had deposited money in the corporation account and this was just taking out those sums of money. Now, there are some deposits at approximately the same time the checks were

issued that are about the same amount, but nevertheless, there are many other checks written to him which don't have a deposit which might correspond. The witness Mr. Bancroft testified that he had other bank accounts. In fact, he mentioned a great number of them and had a great number of checks in court although they were not submitted in evidence. It seems to me illogical for anyone to deposit money in this account when he had so many other accounts that he could have drawn the checks from, and when asked on the witness stand whether he had any checks made payable by him to the plaintiff, he said that he had none.

There have been some accusations made here with reference to the minute book. It is highly possible that the minute book is incomplete, but the fact that it is incomplete does not warrant me in assuming that there would be matters therein which the defendants -- that is, which would prove that the defendants had defrauded the plaintiff or either of the two officers. As I have stated, the testimony here does not substantiate any of the claims made by the plaintiff or its officers. I think it should also be pointed out that the books of the corporation, the minute book, were, for a great length of time in the possession of the attorney for the plaintiff, Mr. McDougal, and as was testified here, there were various other attorneys. Now, it has been testified here that Mr. McDougal drew some of the agreements. As I have stated previously, the agreements refer to the note and deed of trust held by the defendant Mary Cladis, and as far as any proof that there has -- or even establishing a prima facie case that either Mary Cladis, and

of course as I stated previously Gus Cladis has definitely never been proven to have obtained any funds, there is really not a prima facie case established against either one.

Therefore, as to the Second Claim for relief I will grant the defendant's motion to dismiss.

As to the First Claim for relief, as I stated previously, it has been definitely established that the defendant Mary Cladis owned this property by agreement with the other parties. That she conveyed the property to the plaintiff corporation. That she received a deed of trust in November of 1950 for $70,366.94. That thereafter she received some moneys on interest. It specifically was called to mind the payment of February 24, 1953, when a payment of $5,000 was made to her. This specifically states that it was on principal and interest. However, in computing the amount of interest owed at that time, it exceeded the sum of $5,000. The rate of interest was six percent, and as pointed out by the defendants' attorney, even though there is a conflict between the note and the deed of trust, the note must prevail, as the language of the deed of trust specifically states that it is security for a deed of trust of even date and only refers to the note, so that the language of the note would prevail, and the amount of interest would be six percent. In my computations I think it is highly possible that the amount of 122,000 bid at the sale was incorrect. That the amount owing at that time was probably some sum which was less than that. Without a computation, of course, I don't know.

Now, as to the allegation by the plaintiff

that there was no consideration for the execution of the note and deed of trust, I think this definitely has not been substantiated at all. As I stated, the minutes refer to the note and deed of trust. These parties had acted as though it were a valid deed of trust all through the years, and they say now that there had been no consideration, and especially in view of the testimony given on the plaintiff's case, I think this is absolutely incorrect.

Now, it is my feeling that even though the amount of money which was owed at the time was a sum which possibly was less than the $122,000 bid, that nevertheless there was no tender by the plaintiff corporation of any amount to redeem this property either at the time of the Public Trustee's sale or in any of the pleadings before the court, and since a substantial amount of money is owed to the defendant Mary Cladis, and since no tender has been made by the plaintiff corporation of any amount, it is the feeling of this Court that the First Claim for relief must also be dismissed.

In view of that fact, the motion of the defendants for the dismissal of the First Claim for relief is also granted.

Done in Open Court the day and year first above written.

BY THE COURT:
/s/ Saul Pinchick
JUDGE

Friday, October 1, 1965

APPENDIX "C"

NO. 23187

HARICLIA C. BALLAS, C. P. BALLAS, VASIL BALLAS, and HELEN QUICKENSTEDT,
Plaintiffs in Error,

vs.

MARY CLADIS, PETER L. BANCROFT, NICHOLAS NICHOLSON, GUS CLADIS and UNITED STATES FLUORSPAR & MANGANESE, INC.,
Defendants in Error.

Error to the District Court of the City and County of Denver

Honorable Edward J. Byrne, Judge

IN DEPARTMENT JUDGMENT AFFIRMED

Herbert M. Boyle,
Attorney for Plaintiffs in Error.

Walter F. Scherer
Clarke W. Karr,
Attorneys for Defendants in Error
Mary Cladis and Gus Cladis

Opinion by MR. JUSTICE McWILLIAMS

Ballas and others, hereinafter referred to as the plaintiffs, alleging that they were stockholders in the United States Fluorspar & Manganese, Inc., hereinafter referred to as the

corporation, brought an action against the following named defendants: (1) the corporation; (2) Peter Bancroft and Nicholas Nicholson, who were said to be officers and directors of the corporation; and (3) Mary Cladis, who was also asserted to be an officer and director of the corporation, and her son Gus Cladis.

In their complaint the plaintiffs sought no relief, as such, from either the corporation or Bancroft and Nicholson. Rather, the gravamen of their complaint concerned certain mining property and mining machinery and equipment, title to which Mary Cladis had obtained in a foreclosure proceeding theretofore brought by her against the corporation. It was claimed that the foreclosure proceedings were invalid and that the title to the aforementioned properties acquired by Mary Cladis in the foreclosure proceeding was subject to a constructive trust in favor of the corporation. Accordingly, the plaintiffs asked that Mary Cladis be required to convey the property which was the subject of the foreclosure proceedings back to the corporation.

In response to this complaint the corporation and Bancroft and Nicholson filed a joint answer and cross-complaint against Mary and Gus Cladis in which they asked the court to grant the reflief prayed for by the plaintiffs.

One of the several defenses pleaded by Mary and Gus Cladis to both the complaint and cross-complaint was that of res judicata. Thereafter, in a verified motion, Mary and Gus Cladis moved for a summary judgment on the ground of res judicata. No evidentiary matter was offered either in support of, or in opposition to, the

aforesaid motion for summary judgment. However, counsel for Cladis did ask the particular trial judge who heard the motion for summary judgment to take judicial notice of two other actions theretofore brought and tried in the Denver District Court. The trial judge declined to take such judicial notice and denied the motion for summary judgment, with the comment that summary judgment was a "drastic remedy" and under the circumstances improper.

The case later came on for a trial to the court, with the judge presiding at the trial of the case being a different judge than the one who had previously denied the motion for summary judgment. Upon trial the trial court determined to dispose of the issue raised by the Cladis' affirmative plea of res judicata, before plunging into a trial on the so-called merits of the controversy.

In support of their plea of res judicata, Mary and Gus Cladis introduced into evidence the so-called judgment rolls of the Denver District Court in civil actions Nos. B-63012 and B-65288, as well as the record made upon the trial of those two separate actions which were by order of court consolidated for trial purposes. The record thus tendered and received contained among other things the findings, conclusions and judgment entered in the consolidated proceedings. In opposition thereto the plaintiffs offered no evidence bearing on the issue raised by the defense of res judicata.

It was on this state of the record that the trial court in the instant proceeding upheld the plea of res judicata and entered judgment in

favor of Mary and Gus Cladis, and dismissed plaintiffs' claim, as well as the cross-claim interposed by the corporation and Bancroft and Nicholson. By this writ of error the plaintiffs -- but not the corporation or Bancroft and Nicholson--seek reversal of the judgment thus entered.

Disposition of this controversy requires some comparison of the pleadings in the instant case and the pleadings in civil actions No. B-63012 and B-65288. On June 3, 1963 the corporation instituted an action in the Denver District Court against Mary and Gus Cladis and one John W. Hughes, public trustee for Chaffee County, which action was numbered as civil action No. B-63012. In this complaint it was alleged that on or about November 8, 1950 the corporation executed and delivered its promissory note to Mary Cladis in the sum of $70,366.94 and that in order to secure payment of this note the corporation also executed and delivered to the public trustee of Chaffee County a deed of trust covering certain described mining property, as well as some mining machinery and equipment. It was further alleged that on March 4, 1963, after publication of a notice of sale, the public trustee sold the aforementioned property to Mary Cladis upon her bid of $122,870.25. Without detailing all of the many allegations in this very lengthy complaint, it should be noted that the corporation generally complained about Mary and Gus Cladis as follows:

(1) that Mary Cladis owed a fiduciary relationship to the corporation, and that her son, Gus, assisted her in the actual management of the corporation;

(2) that there was no consideration for the note and deed of trust executed and delivered to Mary Cladis by the corporation;

(3) that Mary and Gus Cladis had converted to their own use property and funds of the corporation, and that they should be required to make an accounting;

(4) that Mary and Gus Cladis "conspired" for the purpose of "preventing" the corporation from buying or leasing other mining properties, and that the corporation was damaged by these actions in the amount of $1,000,000;

(5) that Mary Cladis had subscribed to 125,000 shares of stock in the corporation at $1 per share, but had not paid any part of the subscription; and

(6) that the title acquired by Mary Cladis in the foreclosure proceeding is held by her as a constructive trustee for the corporation.

On September 3, 1963, Marion T. Quinn and others, as stockholders in the corporation, instituted an action against the corporation, Bancroft and Nicholson, Mary Cladis and John Hughes, this particular action being numbered civil action No. B-65288. In this proceeding the corporation and Bancroft and Nicholson filed a cross-complaint against Mary Cladis and John Hughes which for all practical purposes was identical with the claim asserted by the corporation in civil action No. B-63012. In civil action No. B-65288 the Quinn complaint was dismissed on Cladis' motion for summary judgment, this ruling being based on what the trial court determined to be a lack of capacity on the part of Quinn, et al. to maintain the proceeding. However, the cross-claim in

civil action No. B-65288 was then consolidated with civil action No. B-63012.

Consolidated actions numbered B-63012 and B-65288 were later tried by the Honorable Saul Pinchick of the Denver District Court and, after a trial of several days, culminated in a judgment entered on September 30, 1965 in favor of Mary and Gus Cladis and John Hughes, and dismissal of both the claim of the corporation and Bancroft and Nicholson made in civil action No. B-63012 and their cross-claim asserted in civil action No. B-65288. In its resolution of these consolidated cases the trial court made the following findings and conclusions which bear upon the present controversy:

(1) that the note and deed of trust delivered to Mary Cladis by the corporation was supported by good and sufficient consideration and was otherwise a valid and binding obligation of the corporation;

(2) that the accusation that Mary and Gus Cladis had converted to their own use money and properties belonging to the corporation was not true and that there was "no testimony whatsoever" to show a conversion on the part of either Mary and Gus Cladis;

(3) that the corporation was entitled to none of the relief which it had sought in its claim and cross-claim in the two aforesaid civil proceedings; and

(4) specifically dismissed the corporation's first claim for relief wherein it attacked the validity of the foreclosure proceedings and sought an order prohibiting the public trustee from issuing a deed based on the certificate of purchase which had theretofore issued on March 4, 1963.

Shortly thereafter, on November 12, 1965, to be exact, the plaintiffs filed the present action. And, as above indicated, the complaint filed by these plaintiffs very closely paralleled the claim and cross-claim asserted by the corporation and Bancroft and Nicholson against Mary and Gus Cladis, as well as John Hughes, in civil actions numbered B-63012 and B-65288, respectively. Specifically, complaint was again made that there was no consideration for the note and deed of trust given Mary Cladis by the corporation. Also, it was once again asserted that Mary Cladis had breached her fiduciary relationship to the corporation in several particulars and, as concerns the property to which she obtained title in the foreclosure proceedings, it was said that she held the title to these properties in a constructive trust for the benefit and use of the corporation and therefore should be ordered to convey such properties back to the corporation. Finally, it was also alleged in rather broad strokes that Mary and Gus Cladis had converted property to their own use belonging to the corporation; that they had conspired to the end that the corporation "would lose its principal and only asset"; and that Mary and Gus Cladis should be required to make an accounting.

It was on this general state of the record that the trial court upheld the defense of res judicata and dismissed not only the plaintiffs' claim for relief but also the corporation's cross-claim. In thus disposing of the present controversy we perceive of no error on the part of the trial court.

Plaintiffs' basic argument as to why res

judicata is not a defense to their claim for relief is based on the premise that they, as stockholders of the corporation, are in nowise bound by the adverse judgments suffered by the corporation in civil actions Nos. B-63012 and B-65288. However, our analysis of the matter leads us to conclude that on the contrary the plaintiffs are bound by the adverse judgments suffered by the corporation and that the trial court's determination that Mary and Gus Cladis had established their defense of res judicata was under the circumstances correct.

The general rule in this regard is set forth in 18 Am. Jur. 2d 987 and reads as follows:

> "When a corporation sues or is sued in its corporate name, the action is by or against the corporation itself as a legal entity, and its members are not in any legal sense parties to the action or to the judgment rendered therein. However, in numerous instances, a judgment against a corporation in an action involving corporate matters has been held conclusive as to such matters in a subsequent action by or against its stockholders, on the theory that the stockholders are represented in such an action by the corporation and are privy to the proceedings."

And, in accord with the foregoing, in Croke v. Farmers Co., 71 Colo. 514, 208 P. 466 we held that there is a privity between a corporation and its stockholders and that a decree against the former is "conclusive" on the latter. In A. T. & S.F. Ry. Co. v. Com'rs, 95 Colo. 435, 37 P.2d 761 this same derivative relationship was held to exist between a school

district or county and its taxpayers. In the latter case it was observed that in the absence of collusion a decree against a corporation is binding on its stockholders because there is a privity between a corporation and its stockholders. See also in this same general connection Montezuma Cattle Co. v. Dake, 16 Colo. App. 139, 63 P. 1058; Beers v. Denver & R. G. W. R. Co., 286 F. 886; and Levy v. Equitable Trust Co., 271 F. 49.

In the instant case there is no allegation that there was collusion between the corporation and Mary Cladis. Certainly an examination of the record made in the consolidated trial reveals a trial that was truly adversary in nature. Such being the case, application of the rule announced in the Croke case leads us to the conclusion that the adverse judgments by the corporation are "conclusive" on these plaintiffs.

Plaintiffs suggest that they are not thus bound by the judgments entered in the two other civil actions because they sought to raise issues which were not raised in the other proceedings. Our study of the pleadings in the instant case indicates quite clearly that the various issues sought to be raised were for all practical purposes the same as those litigated and determined in the two earlier actions. In any event, the rule is that a judgment on the merits concludes the parties not only as to issues actually resolved, but also to all matters germane to the general issue which could or might have been litigated therein. McDermott v. Bent Co. Dist., 135 Colo. 70, 308 P.2d 603, and Newby v. Bock, 120 Colo. 454, 210 P.2d 985.

Plaintiffs contend quite earnestly that the denial of the Cladis' motion for summary judgment became "the law of the case" to the end that the judge who presided at trial could not thereafter make a finding that the doctrine of res judicata was a proper defense. In support of this rather startling contention the plaintiffs rely upon C.R.S. 1963, 37-4-17 concerning the powers of judges in a multiple judge court to vacate or modify judgments, decrees or orders made by a brother judge. We believe it to be sufficient to state that in our view the statute relied on, which has since been repealed, has no application. The judge presiding at the trial was not "overruling" the action of the judge who had previously denied the Cladis' motion for summary judgment. Rather, he was determining a contested issue raised by the pleadings after Mary and Gus Cladis had offered much and convincing evidence in support of their affirmative defense of res judicata.

Mary and Gus Cladis assert by way of so-called cross error the action of the trial court wherein it denied their motion that the expense incurred by them in connection with obtaining the judgment rolls in actions B-63012 and B-65288, as well as the reporter's transcript of the consolidated trial, be taxed against the plaintiffs as a part of the costs. These particular items, as we read the record, total $388.80. In support of its position in this regard Mary and Gus Cladis rely upon C.R.S. 1963, 31-4-21(2), which provides that where a stockholder institutes an action "in the right" of a corporation "without reasonable cause," the stockholder may be required to pay to the

parties named as defendants "the costs and reasonable expenses attributable to the defense of such action, but not including fees of attorneys." The aforesaid statute is permissive and not mandatory, and we find that under the circumstances the trial court did not abuse its discretion when it denied this particular request of Mary and Gus Cladis.

The judgment is affirmed.

Mr. Justice Pringle and Mr. Justice Hodges concur.

APPENDIX "D"
Clerk's Office
SUPREME COURT
State of Colorado
Denver, 80203
December 9, 1968

Case No. 23187
Ballas, et al
v.
Cladis, et al

Mr. Herbert M. Boyle,
Attorney and Counselor,
946 Metropolitan Building,
Denver, Colorado. 80202.

Mr. Walter F. Scherer,
Mr. Clarke W. Karr,
Attorneys and Counselors,
500 Capitol Life Center,
Denver, Colorado. 80203.

Gentlemen:

The following proceedings were this day had in the above numbered and titled case.

The petition for rehearing was denied.

Remittitur issued.

Yours very truly,

RICHARD D. TURELLI,
Clerk.
By Florence Walsh
Deputy Clerk.

[redacted]

Supreme Court of the United States

OCTOBER TERM, 1958

HABICILLA C. SALLAS, C. P. SALLAS, VASIL SALLAS, and HELEN QUICKENSTEDT,
Petitioners,

vs.

MARY CLADIS, PETER L. BANCROFT, NICHOLAS NICHOLSON, GUS CLADIS, and UNITED STATES FLUORSPAR & MANGANESE, INC.,
Respondents.

On Petition for Writ of Certiorari
To The Supreme Court of The
State of Colorado

BRIEF FOR RESPONDENTS MARY CLADIS AND GUS CLADIS IN OPPOSITION

[redacted]

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1250

HARICLIA C. BALLAS, C. P. BALLAS, VASIL BALLAS, and HELEN QUICKENSTEDT,
Petitioners,

VS.

MARY CLADIS, PETER L. BANCROFT, NICHOLAS NICHOLSON, GUS CLADIS, and UNITED STATES FLUORSPAR & MANGANESE, INC.,
Respondents.

On Petition For Writ of Certiorari To The Supreme Court of The State of Colorado

BRIEF FOR RESPONDENTS MARY CLADIS AND GUS CLADIS IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Colorado is reported at 447 P.2d 224.

JURISDICTION

The judgment of the Supreme Court of the State of Colorado of which review is sought became final when remittitur issued on December 9, 1968. The petition for

writ of certiorari was docketed on April 11, 1969, a time beyond the period provided by 18 U.S.C. 2101. These respondents were not served with applications for extensions of time as required by Court Rules 34 and 50. This Court is without jurisdiction in that the extensions of time obtained without compliance with the rules are to be regarded as nullities.

No substantial federal question was raised in the courts below, by pleading or otherwise. This Court is without jurisdiction to consider questions not raised either in the trial court or the state appellate court.

QUESTIONS PRESENTED

Although petitioners couch the questions they present in different terms, the only question presented by the record is whether a State court can bind the shareholders in a corporation by an adjudication adverse to their corporation without violating their rights under the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Colorado in its opinion (P. 15) announced November 18, 1968, affirmed the judgment of the District Court in and for the City and County of Denver and State of Colorado (P. 7) entered June 26, 1967, which held the judgment of the same court in an earlier action (P. 10) entered October 1, 1965, to be a bar to a stockholders' derivative action brought by petitioners in the right of respondent United States Fluorspar & Manganese, Inc.

STATEMENT

The statement of the case contained in the petition is incorrect.

Mary Cladis purchased the subject real estate from the trustee in bankruptcy for Chaffee County Fluorspar Corporation and became owner of it (P. 13). She conveyed it to respondent U. S. Fluorspar & Manganese, Inc. (here-

inafter called the corporation) and took in exhange a note for $70,366.94, secured by a deed of trust on the property conveyed.

The first case was an action brought by United States Fluorspar & Manganese, Inc. to enjoin foreclosure of the deed of trust by public trustee's sale or to impress a constructive trust on the subject property in the hands of the purchaser. The second case was a derivative action brought by petitioners, as alleged shareholders, in the right of the corporation for the same relief and on the same grounds.

The trial court held in the first case that the note was supported by a consideration and that it was authorized and regarded as valid by the parties from November, 1950, until it was attacked after foreclosure was commenced in 1962. In upholding the foreclosure of the deed of trust, the trial court held in the first case that a substantial balance was due on the secured note (P. 14). The judgment sought to be reviewed merely holds the first judgment to be a bar to a subsequent stockholders' derivative suit attacking the foreclosure on similar grounds.

Since 1894, Colorado has provided a rational system of securing debts by deeds of trust to a public trustee which in 1962 was contained in '53 C.R.S. 118-3-1, et seq. This system requires the giving of notice of the creditor's initiation of foreclosure proceedings by recording in the public records, by publication of a notice, and by mailing to the grantor of the deed of trust and all others having a record interest in the encumbered real estate. In this case it is confessed that the foreclosure proceedings under the Public Trustee Act were regular in all respects (R. folio 241). The Supreme Court of Colorado held in its opinion from an examination of the record that the trial of the first case was truly adversary (P. 23). An accounting was provided by a trial lasting several days (P. 20).

Petitioners thus find themselves urging in this Court that they, as shareholders, should not be bound by an ad-

judication adverse to their corporation on the grounds that they should be entitled (under the Fourteenth Amendment) to some notice in addition to the recorded, published and mailed notices provided by the act, or some accounting in addition to the trial between the creditor and their corporation.

STATUTES INVOLVED

The Colorado Public Trustee Act ('53 C.R.S. 118-3-1, et seq.) provides in part as follows:

> "118-3-13. Beneficiary elect to foreclose — notice. — Whenever the beneficiary under a deed of trust or the legal holder of the indebtedness secured thereby, shall declare a violation of any of the covenants of a deed of trust and elect to advertise the property therein described for sale, he shall file said notice of election and demand for sale in writing with such trustee and the trustee shall thereupon advertise the premises named in such deed for sale in accordance with the terms of sale specified in such deed and thereupon the trustee shall securely paste such notice of election and also a printed copy of the notice of sale in a book to be kept by him for that purpose, which book shall be open for the inspection of the public at all reasonable hours. Upon receipt of such notice of election and demand for sale the trustee shall cause a copy of the same to be recorded in the recorder's office of the county in which the real estate affected is situated and the recording fee for the same shall be collected as part of the expense of said sale. The trustee within ten days from the date of the first publication of said notice shall mail a printed copy thereof without extra charge to the grantor at the address given in the trust deed and he shall also mail a like notice to each and every person who appears to have acquired a record interest in said real estate, subsequent to the recording of said trust deed, whether by deed, mortgage, judgment

or any other instrument of record. Such notice shall be mailed to such persons, at the address given in the recorded instrument of writing. If such recorded instrument of writing does not give such address it will not be necessary to mail any notice to the particular persons, whose address is not so given. Where only the county and state is given as the address of such persons, then such printed notice shall be mailed to the county seat of such county. It will not be necessary to mail a copy of said printed notice to any person whose interest does not appear of record at the time said notice of election and demand for sale is recorded. Whenever such public trustee shall make a sale of the property described in a deed of trust he shall enter in a book to be kept by him for that purpose, a record of the name of the person or persons, executing such deed of trust, the date thereof, a brief description of the property therein described, the date of the sale, the name of the newspaper printing the notice of the sale, the name and last postoffice address of the purchaser at such sale and the amount at which such property was sold in separate parcels if so sold or en masse. The public trustee shall not be entitled to any fees whatever for keeping such notice of record."

ARGUMENT

The corporation was afforded a trial in the first case on all the issues the petitioners sought to raise in the subsequent derivative suit. The Supreme Court of Colorado so held (P. 22).

It has long been held that to bind the shareholders by a judgment obtained against a corporation without fraud does not violate the Fourteenth Amendment to the Federal Constitution. See *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 35 S.Ct. 625, 628 (1914). Apt language appears in a case cited in *Coe, Sanger v. Upton*, 91 U.S. 637, 23 L.Ed. 220, 221 (1875):

> "In view of the law, she [the stockholder] was before the court in all the proceedings touching the body of which she was a member. In point of fact, stockholders in such cases can hardly be ignorant of the measures taken to reach the effects of the corporation. If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, especially to make an objection which looks rather to the embarrassment and delay than to the right and justice of the case. A different rule would be pregnant with mischief and confusion."

It has long been the rule in Colorado that there is a privity between the shareholders and a corporation which makes a judgment against the latter conclusive against the former. *Croke v. Farmers Co.*, 71 Colo. 514, 208 P. 466 (1922).

The like rule has long prevailed in the 10th Circuit *Beers v. Denver & R.G.W.R. Co.*, 287 F. 886 (1923).

The Chicago, R. I. & Pac. R. Co. v. Howard, 74 U.S. 205, 19 L.Ed. 117 (1869) involved rival claims of shareholders as against creditors to a fund produced by the sale of the railroad corporation's assets on foreclosure of mortgage bonds. The contention was made that the shareholders were necessary parties. The Court held that the shareholders were sufficiently represented in the action by the corporation itself and a committee appointed by part of the shareholders even though some of the shares might be in the hands of innocent purchasers. We think this is equivalent to a holding that the shareholders were entitled to no separate notice or opportunity to be heard.

This case was read to the same effect and followed in *James, et al. v. Central Trust Co.*, 98 F. 489 (C.C.A. 4th, 1899). There the federal court enjoined an effort to have a state receiver take a railroad from the purchaser at a foreclosure sale decreed in an earlier federal court action.

The holding was that the shareholders in the mortgagor railroad were bound by the foreclosure decree although they were not parties and could not maintain the later state action disregarding the prior adjudication.

CONCLUSION

The judgment of the Supreme Court of Colorado is right. No substantial federal question is presented. The petition for writ of certiorari should be denied.

Respectfully submitted,

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May, 1969.